UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 52

Docket No. SF-0752-09-0867-I-1

Richard Brott,

Appellant,

v.

General Services Administration,

Agency.

May 18, 2011

Curtis A. Phelps, San Francisco, California, for the appellant.

Deborah Finch, San Francisco, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The agency has petitioned for review of an initial decision that reversed the appellant's removal. For the reasons set forth below, we AFFIRM the initial decision AS MODIFIED by this Opinion and Order, still reversing the removal.

BACKGROUND

¶2 Effective November 13, 2008, the agency removed the appellant from the WG-1 Laborer position at the Western Distribution Center, Federal Acquisition Service. The appellant performed his duties in the hazardous materials (HazMat) area of a warehouse where both federal employees and contract employees

worked. Hearing Transcript (HT) at 43. The appellant's duties included packing boxes and loading them onto a conveyer. HT at 203-04. The agency charged the appellant with the following misconduct: (1) On July 23, 2008, disorderly conduct and failure to follow instruction, specifically, using abusive language to a coworker, while loading the packing belt line, and leaving the facility when his supervisor ordered him to stop using abusive language; (2) on July 24, 2008, failure to follow instructions to report to the facility manager, James Gorman, regarding the incident of July 23, 2008, and absence without leave (AWOL); (3) on July 25, 2008, AWOL; and, (4) on August 20, 2008, disorderly conduct, specifically, using abusive language to two coworkers and throwing a 25 lb box containing caustic material onto the floor. Initial Appeal File (IAF), Tab 4, Subtabs 4b, 4c. The agency also relied on the appellant's prior misconduct, a 3-day suspension and a 30-day suspension, both for unauthorized absence, to select the penalty of removal. *Id*., Subtab 4c.

¶3 The appellant filed an equal employment opportunity complaint alleging discrimination on the basis of his disability, mental retardation. IAF, Tab 2. The agency issued a final decision finding no discrimination, and the appellant timely filed a Board appeal, again alleging that the agency action constituted discrimination on the basis of his disability. *Id*.; IAF, Tab 5. The appellant asserted that the charged misconduct was the result of the hostile, non-sexual harassment environment in the HazMat area of the warehouse where he worked. *Id*. The appellant sought the accommodation of having the agency provide him with a Work Counselor, something that the agency provided to other employees with the same disability, and to assure that the appellant will be able to work free of hostility and harassment. *Id*.

¶4 Based on the record developed by the parties, including the testimony at the hearing held on December 15, 2009, the administrative judge did not sustain the agency's action. IAF, Tab 25 (Initial Decision (ID)). The administrative judge noted that the appellant had worked at the agency for 17 years at the time

of the misconduct that gave rise to the removal action. ID at 2. She found that, to prove charge (1), the agency must establish by preponderant evidence both disorderly conduct and failure to follow instructions. ID at 4. She found that, when the appellant's supervisor, Edward Ashley, ordered the appellant to stop using abusive language or leave, the appellant said that he would leave the facility. ID at 4. She found that the appellant left and that the agency granted him annual leave for the remainder of the work day. *Id*. She found that therefore the agency failed to prove that the appellant did not follow instructions and thus failed to prove the charge. ID at 4-7.

¶5 As with charge (1), the administrative judge found that to prove charge (2), the agency must establish by preponderant evidence both failure to follow instructions and AWOL. ID at 7. The administrative judge found that the agency proved the charged misconduct. *Id*. However, she noted that the appellant testified that he had a reason for not following the order. ID at 9. She noted that the appellant testified that he did not want to see Gorman while he (the appellant) was upset. ID 9. She noted that the appellant testified that he had to do his "cussing" outside. *Id*.

¶6 As to charge (3), the administrative judge found that the agency failed to show that its decision to deny the appellant leave on July 25, 2009, was appropriate. She found that the appellant testified credibly that he could not get to work because his ride had already left and his bike, which was his usual means of transportation to work in good weather, had a flat tire. ID at 9-12. She also found that he testified credibly that he left a message with a person he called Debbie who "took down" a message for his supervisor explaining that the appellant could not come to work because his bike had a flat tire. *Id*.

¶7 As to charge (4), the administrative judge found that the appellant's alleged abusive language and swinging and throwing a box on the floor comprised a single inseparable event. ID at 13. The administrative judge carefully reviewed the evidence regarding charge (4) and found plausible and credible the appellant's

description of the situation. She found, as the appellant explained, that he cursed at only one coworker, a contract employee named John Sargent, after Sargent placed a heavy box directly on the appellant's fingers, although not necessarily intentionally. She found that the coworker giggled, and then the appellant picked up or grabbed the box and swung it around or off the line to place it on the pallet. As the appellant was placing the box on the pallet, the handle broke, the appellant caught the box with his legs and pushed it into a bubble wrap bin, then to the floor, rather than throwing it on the floor. ID at 18. The administrative judge found that the agency failed to show that the appellant swung the box and threw it on the floor. She found that the appellant cursed, but noted that the record showed that cursing is "kind of everyday language in the warehouse." ID at 19 n.8. She did not sustain charge (4).

¶8 Finally, the administrative judge found that the appellant established by direct evidence his affirmative defense that the agency discriminated against him on the basis of his disability. She found credible the appellant's testimony that his supervisor, Ashley, had called the appellant a "retard" and that this constituted preponderant evidence of a discriminatory attitude. She found that most of the evidence in support of charges (1) and (2) and all of the evidence in support of charge (3) came from Ashley's Record of Infraction. ID at 21-23. She found that the agency failed to show by preponderant evidence that it would have taken the removal action against the appellant with or without discriminatory motive. ID at 23-28. The administrative judge reversed the agency's action and ordered interim relief. ID at 29-30.

¶9 The agency petitions for review. Petition For Review (PFR) File, Tab 1. Accompanying the petition is an SF-50 showing the agency effected the administrative judge's interim relief order. *Id*. at 37. The appellant responds in opposition to the petition. PFR File, Tabs 3, 4.

ANALYSIS

The administrative judge's findings with respect to the charges were correct.

¶10 A charge usually consists of two parts: (1) A name or label that generally characterizes the misconduct; and (2) a narrative description of the acts that constitute the misconduct. *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 203 (1977). The Board may not split a single charge into several independent charges and then sustain one of the newly-formulated charges, which represents only a portion of the original. *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990). In *Burroughs*, the court used the term "charge" to apply to the charge's label, holding that when an agency names a charge so that the label has more than one element, then the agency must prove all of the elements for the overall charge to be sustained.

¶11 Here, the administrative judge properly found that to prove its charges, the agency must have proven all the elements of the label of each charge. Applying *Burroughs*, the administrative judge correctly concluded that the agency failed to prove the charge of disorderly conduct and failure to follow instructions on July 23, 2008. We also find that the administrative judge properly did not sustain the charges of AWOL on July 25, 2008, and disorderly conduct on August 20, 2008.

The appellant may not prevail on his claim of disability discrimination under a mixed-motive theory.

¶12 The U.S. Supreme Court has held that in Title VII cases, a plaintiff will prevail under a "mixed-motive" analysis if he shows that proscribed discrimination was a motivating factor in the adverse employment decision, but that an employer may avoid liability by showing it would have taken the same action absent the prohibited discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989), *superseded by statute as recognized in Lewis v. American Foreign Service Association*, 846 F. Supp. 77 (D.D.C. 1993). In *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2351-52 (2009), the Court found that lower courts had erroneously applied the mixed-motive analysis announced

in *Price Waterhouse* to the Age Discrimination in Employment Act (ADEA). In holding that the ADEA does not authorize mixed-motive age discrimination claims, the Court relied on the language of the ADEA requiring a showing that the employer took adverse action "because of" age and the fact that Congress had not amended the ADEA to allow for recovery in mixed-motive cases, as it had in Title VII cases. The Court, therefore, held that a plaintiff alleging that an employer took an adverse employment action proscribed by the ADEA must prove by preponderant evidence (either direct or circumstantial) that the employer took the action "because of" the plaintiff's age and that the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when the plaintiff has produced some evidence that age was one motivating factor in the adverse employment decision. *Gross*, 129 S. Ct. at 2351-52.

¶13 Relying on *Gross*, the Seventh Circuit has concluded that lower courts, including the Seventh Circuit, had erroneously applied the mixed-motive analysis to disability discrimination cases arising under the pre-2009 Americans with Disabilities Act (ADA).[*] *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961-62 (7th Cir. 2010). The court reasoned that the ADA, like the ADEA, renders employers liable for decisions made "because of" a person's disability,

---

[*] We note that the ADA Amendments Act of 2008 (ADAAA) removed the provision in the ADA that an employer may not discriminate "because of" an employee's disability, and amended the ADA to provide that an employer may not discriminate against an individual "on the basis of" disability. 42 U.S.C. § 12112(a) (2009). To resolve this case, the Board need not make a finding on whether the phrase "on the basis of" means something different from "because of" and whether this, or other revisions to the ADA, affects the viability of a mixed-motive claim under the ADA for a disability discrimination case arising after the effective date of the ADAAA. The Board overrules *Caronia v. Department of Justice*, 78 M.S.P.R. 201, 214-16 (1998), *overruled in part on other grounds by Carter v. Department of Justice*, 88 M.S.P.R. 641, ¶ 25 n.5 (2001), which held that, under the ADA, an appellant is entitled to some relief for discrimination on the basis of disability if he shows that the agency had "mixed-motives" for its action. However, the Board reserves for a future decision whether the reasoning employed in *Caronia* remains applicable to cases arising under the ADAAA.

and that this language in the ADA necessitated finding an employee alleging disability discrimination under the pre-2009 ADA must establish that his disability was the "but for" causation of the employer's adverse action. *Id.* Thus, the Seventh Circuit found that a plaintiff alleging that an employer took an adverse employment action proscribed by the ADA must prove by preponderant evidence that the employer took the action "because of" the plaintiff's disability and that the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of disability, even when the plaintiff produced some evidence that disability was one motivating factor in the adverse employment action. *See Serwatka*, 591 F.3d at 961-962.

¶14 We agree with the Seventh Circuit's analysis and find that, in disability discrimination cases arising before the January 1, 2009 amendments to the ADA, the appellant must prove by preponderant evidence that the agency took an adverse action "because of" his disability, and that the burden of persuasion does not shift to the agency to show that it would have taken the action regardless of disability, even when the appellant produced some evidence that disability was one motivating factor in the adverse employment action. Accordingly, we must analyze the disability discrimination claim in this matter without relying on a mixed-motive framework.

The appellant proved his claim of disability discrimination by circumstantial evidence.

¶15 An appellant may meet his burden of persuasion in a disability discrimination case through direct or circumstantial evidence. *See Sarratt v. U.S. Postal Service*, 90 M.S.P.R. 405, ¶ 12 (2001). Direct evidence of discrimination may be any statement made by an employer that (1) reflects directly the alleged discriminatory attitude, and (2) bears directly on the contested employment decision. *Arredondo v. U.S. Postal Service*, 85 M.S.P.R. 113, ¶ 13 (2000). Direct evidence "is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor. If

an alleged discriminatory statement at best merely suggests a discriminatory motive, then it is only circumstantial evidence." *Davis v. Department of the Interior*, 114 M.S.P.R. 527, ¶ 7 n.2 (2010) (internal citations omitted).

¶16 Here, the administrative judge incorrectly found that the appellant presented direct evidence of discrimination because the remarks on which she relied did not bear directly on the appellant's removal. As explained below, we find that this error did not harm the parties' substantive rights, *see Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984), because the appellant's circumstantial evidence of disability discrimination established by preponderant evidence that the agency removed him because of his disability, mental retardation.

¶17 The appellant's circumstantial evidence of disability discrimination is very strong. Before the removal action, the appellant's supervisor called him a "retard" directly and he repeated it in the presence of others, including the union representative in the appellant's area, to whom he stated that he had told the appellant that he was a "fucking retard." HT at 137. There is no indication that this supervisor's attitude toward the appellant changed from the time that he made the disparaging remark about the appellant's mental limitations until the time that his records became the basis of the adverse action against the appellant. Although the supervisor testified that he did not call the appellant a "retard," HT at 254-255, the administrative judge found his very limited testimony not credible. ID at 22.

¶18 Further, there is no evidence that the supervisor counseled other employees to cease calling the appellant a "retard." The practice of coworkers harassing the appellant by calling him a "retard" continued up to the time of the incidents on which basis the agency charged the appellant with misconduct. HT at 139, 229. The appellant testified that he used the abusive language that made up one element of the sustained charge in response to a coworker calling him a "retard." HT at 227.

¶19 Although the appellant's supervisor was not the proposing or deciding official in the removal action, most of the evidence in support of charges (1) and (2), and all of the evidence in support of charge (3) came from this supervisor's Record of Infraction. Thus, not only is the agency's action against the appellant weak because it failed to prove three of the four charges against the appellant, but, as detailed above, the appellant established that this supervisor's discriminatory attitude permeated the entire action. *See Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226-27 (5th Cir. 2000) (finding in an ADEA case that if an employee demonstrates that others had influence or leverage over the official decision maker, it is proper to impute their discriminatory attitudes, as evidenced in that case by discriminatory remarks, to the formal decision maker).

¶20 The appellant has established by preponderant evidence that his disability "had a determinative influence" on the agency's decision to remove him. *See Gross*, 129 S. Ct. at 2350. Reversal of the removal action is therefore appropriate.

ORDER

¶21 We ORDER the agency to cancel the removal and to restore the appellant effective November 13, 2008. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶22 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due,

and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶23 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶24 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶25 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶26 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of

the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § § 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST COMPENSATORY DAMAGES

You may be entitled to be paid by the agency for your compensatory damages, including pecuniary losses, future pecuniary losses, and nonpecuniary losses, such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. To be paid, you must meet the requirements set out at 42 U.S.C. § 1981a. The regulations may be found at 5 C.F.R. § § 1201.201, 1201.202, and 1201.204. If you believe you meet these requirements, you must file a motion for compensatory damages WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
    a. Outside earnings with copies of W2's or statement from employer.
    b. Statement that employee was ready, willing and able to work during the period.
    c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.